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CASE LAW UPDATE - DIVORCE

Whilst the Pension Funds Adjudicator (“the Adjudicator”) provides guidance on whether or not to give effect to a divorce order, there have been judgments which have applied the law by looking at the purpose of the legislation, rather than applying a strict legal interpretation.

It is a known fact that the following must be stated in a divorce order for it to be binding on a fund:

- The date of the divorce order must be during the member's membership in the fund;
- The order must state the correct name of the fund or the name must be identifiable;
- The benefit payable to the non-member spouse must be clearly ascertainable.

The cases below provide further guidance on how to resolve issues which funds have faced in trying to give effect to divorce orders.

In fund living annuities and compulsory in fund annuities

In the Montanari case the court looked at whether a living annuity forms part of the member's estate for the purposes of divorce. The parties were married out of community of property with the accrual system i.e. asset growth accumulated during the marriage is divided equally on divorce.

The husband retired from his employment while he was still married and purchased a living annuity. The issue before the court was whether the living annuity bought by the husband when he retired should form part of the accrual in his estate on divorce.

There was no dispute about the fact that a living annuity is not a pension interest as defined in the Divorce Act and the court concluded that the living annuity was not part of the husband's estate for accrual purposes when they got divorced (payment of the annuity is relevant when determining future maintenance needs of the wife). However when a member purchases an in-fund compulsory annuity or an in-fund living annuity, the fund can deduct a divorce amount from the capital value of a pensioner's pension after retirement because section 37D(1)(d) of the Pension Funds Act (“the Act”) allows for that. The problem with this is that this provision in the Act is in direct conflict with the Divorce Act and should therefore be unenforceable. Clarity is being sought from the Financial Services Board and National Treasury on how to deal with this issue.

The amount due to a non-member spouse

In the T v Municipal Gratuity Fund, the Adjudicator dealt with the requirement that the amount of pension interest which is due and payable to the non-member spouse must be clearly ascertainable from the divorce settlement agreement.

The fund was ordered to make payment of the pension interest to the complainant from the member's benefit in the fund. The divorce order said that the complainant was entitled to 50% net after tax of the member's pension interest in the fund. The fund refused to pay the complainant any amount, on the basis that the amount was not clearly ascertainable.

The Adjudicator said that the Act requires that the portion of pension interest must be assigned in the divorce order. Any attempt to add an addendum or a confirmation letter to the divorce order will be contrary to the Act, as the fund will no longer be making payment in terms of a valid divorce order. Therefore divorce orders and settlement agreements must be clear enough for funds to be able to enforce them. An order that is open to interpretation and in terms of which the amount is not clear will make the order unenforceable. The Adjudicator dismissed the complaint.

Pension interest after retirement

In K v ABSA Pension Fund the Adjudicator determination addressed the issue of dividing the capital value of a pensioner's pension after retirement.

The complainant is a member of the fund and was married to the non-member spouse (“Mrs K”) in community of property. At retirement the complainant retired and elected to receive a pension from the fund. The complainant was already receiving a pension from the fund at date of divorce.

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The settlement agreement that was made an order of court stated that because they were married in community of property they were each entitled to one half share of their joint estate including their pension benefits. Accordingly, the complainant asked the fund to pay 50% of the capital value of his pension benefit to Mrs K; however the fund declined his request.

Both the complainant and Mrs K were aware that there was no pension interest available as the complainant was already receiving a pension and was no longer an active member of the fund at the date of divorce. The complainant approached the Adjudicator seeking an order to compel the fund to pay 50% of the capital value of his pension to Mrs K.

The Adjudicator said the settlement agreement referred to payment of pension interest and not to payment of a share of the capital value of the complainant's pension. She said that even though it appeared that the parties had the intention that 50% of the capital value of the pension be paid to Mrs. K, that intention was not made clear in the settlement agreement. The Adjudicator dismissed the complaint as she found that the parties needed to amend their settlement agreement to reflect their intention to pay a share of the capital value of the complainant's pension to Mrs. K.

Pension interest and community of property

In the matter of Ndaba the Supreme Court of Appeal dealt with the interpretation of section 7(7) and 7(8) of the Divorce Act.

The parties were married in community of property and both were members of the *Government Employees Pension Fund ("the Fund"). The settlement agreement (which was made an order of court) said that the joint estate would be divided equally between them on divorce as the parties could not agree on how to divide their joint estate. *Please note that the Fund is not subject to the Pension Funds Act. It is subject to the Government Employees Pension Law ("GEPL").

In the High Court matter the non-member spouse asked the court for an amended order in terms of which they would receive 50% of each other's pension interest and that the Fund endorse their respective records to say that pension interest will be payable to the non- member spouse when the pension benefit accrues.

The member opposed her application based on the fact that pension interest did not form part of the wife's claim in the divorce proceedings; it did not form part of the settlement agreement; no order was granted which deemed that their respective pension interests were to form part of the assets in the joint estate and that as a result, the non-member spouse had unequivocally renounced her claim to pension interest in the divorce action.

The High Court dismissed the wife's application. It concluded that an order in terms of section 7(7) (a) and (8) of the Divorce Act can only be granted by the court granting the divorce. If the divorce court did not grant an order stating the pension interest forms part of the joint estate, then the pension interest did not form part of the joint estate.

In the Supreme Court of Appeal ("SCA") matter the court looked at section 7 (7) and (8) of the Divorce Act, the definition of pension interest and whether the GEPL allows for the reduction of a member's benefit.

The SCA confirmed that the GEPL allows for the reduction of a member's benefit if it is done in terms of section 7 (8) of the Divorce Act and that section 7(7) can be read on its own and that it is not subject to section 7(8). Therefore pension interest is deemed to be part of the joint estate i.e. their respective pension interests were automatically part of the joint estate.

The court said that in the absence of a forfeiture of benefits, the spouses become co-owners in undivided and indivisible half-shares of all the assets that are acquired during their marriage. The joint estate must therefore include the pension interest of both husband and wife.

The SCA ruled in favour of the wife and ordered that both parties are entitled to 50% of each other's pension interest in the Fund.

This determination does not follow the requirements of the Pension Funds Act and the Divorce Act.